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in the
Supreme Court
of the
United States

NO. _____

MIAMI POLICE BENEVOLENT ASSOCIATION, INC.,
Petitioner,

vs.

GEORGE H. ADAMS, ET AL.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The response of the above named Respondents to the Petition for a Writ of Certiorari to review the decree of the Court of Appeals for the Fifth Circuit entered February 2, 1972, affirming the decree of the United States District Court for the Southern District of Florida, April 27, 1971, respectfully shows to this honorable court:

QUESTIONS PRESENTED FOR REVIEW

The fundamental question presented for review is whether a trial court's findings and appreciation of facts as concurred in by the court of appeals should be reexamined on writ of certiorari.

Petitioners present the question in three (3) parts:

1. Whether Petitioner is a private club with inherent right to be racially discriminatory with respect to membership.

2. Whether Petitioner is so significantly involved with the City of Miami Police Department so that its admitted discriminatory actions amount to constitutionally prohibited state action.

3. Whether Respondents have been deprived of constitutionally protected rights.

Petitioner's questions are subsumed within the fundamental question as stated above in that they go to the facts of the case at bar. The factual matters were found by the trial court to a conclusion, which findings of fact were not believed clearly erroneous by the Court of Appeals.

Additionally, Petitioners assert as error the trial court's denial of its motion for trial by jury. The trial court's denial of the motion was not raised as error, or as an issue presented for review either in written brief or on oral argument. The Court of Appeals did not make even passing reference to the question because it was not called upon to do so. Petitioners now raise the question of right to trial by jury in equitable proceedings as a make-weight —to insure that the court will take jurisdiction even if the main argument lacks substantial grounds. Respondents contend that aside from being without merit, the argument was abandoned on appeal.

STATUTES WHICH THE CASE INVOLVES

Title 42, U.S.C. Section 1981. *EQUAL RIGHTS UNDER THE LAW.*

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title 42, U.S.C. Section 1982. *PROPERTY RIGHTS OF CITIZENS.*

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Title 42, U.S.C. Section 1983. *CIVIL ACTION FOR DEPRIVATION OF RIGHTS.*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The essential facts are contained in the complaint and transcript of the trial court proceedings. The statement of the case is taken from Respondent's brief in the Court of Appeals and references are to the official record of the lower court proceedings.

Plaintiffs are all classified black policemen, in good standing, who are now regularly employed by the City of Miami Police Department under Civil Service.

Defendant is a corporation, chartered under the laws of the State of Florida. Among its expressed purposes are to promote the efficiency of the Police Department, to promote cooperation and harmony of its members, and to promote harmony and cooperation with the general public and public officials. (Plaintiffs' Exhibit 1). Membership in the corporation is made up exclusively of white police officers who are regularly employed by the City of Miami Police Department under Civil Service. A. 459. No black has ever been accepted into membership (A. 416-417), even though one black officer testified to having submitted an application for membership as early as 1959. A. 499. There are now over four hundred (400) members in Defendant corporation. (Plaintiffs' Exhibit 4).

Defendant corporation had a clause in its Constitution since inception more than twenty-five (25) years ago which limited membership to white males. Any Caucasian male in good standing with the Miami Police Department was eligible for membership if he had not attained the age of thirty-three (33). (Plaintiffs' Exhibit 2). Upon the submission of an application along with a fee of Five dollars

($5.00), membership was almost automatic. A. 445. A mere majority approval of those present and voting was required for the acceptance of a new applicant into membership. (Plaintiffs' Exhibit 2). According to a very active member of defendant corporation who had been in office twelve (12) years, only one (1) white applicant had been denied membership prior to 1970. A. 444.

In early 1970, the constitutional provision which limited membership to white males was deleted. At the same time, the provision that a mere majority approval of those present could vote an applicant into membership was also deleted. In its place was added that five (5) negative votes of any number present could reject an applicant. (Plaintiffs' Exhibit 1). The second change negatived the first so as to continue effectively to bar black policemen from membership.

In 1970, the Miami Police Department, under new administration, initiated a community interaction program aimed at bettering community police relations in minority communities. Selected officers were assigned to attend impromptu talk sessions with community residents. At one of such meetings an officer of defendant corporation was questioned by a citizen as to why no black officers were members of the Defendant corporation, Police Benevolent Association. The response to the public was that none had ever applied. A. 481-482.

Shortly thereafter, on December 21, 1970, seven (7) young black officers in excellent standing with the Miami Police Department submitted applications for membership along with checks in the required amount of Five dollars ($5.00). Each of the applicants received letters from the

president of defendant corporation, dated January 14, 1971, informing them their applications for membership had been rejected at the Regular Meeting held January 13, 1971. (Affidavits accompanying original Complaint.) The application fee was also refunded.

After the rejection, the applications were re-delivered to an agent of defendant for re-submission, but before the re-submission, the applicants agreed, and did withdraw their applications in favor of filing a law suit, knowing well that under the revised acceptance procedures that they would be rejected again. Plaintiffs brought this lawsuit on January 29, 1971 to enjoin defendant corporation from its racially discriminatory conduct which has excluded them from membership.

Defendant owns and operates a restaurant in the City of Miami Municipal Building. The profits derived from operations of the restaurant go into defendants' private funds. A. 438. For kitchen and janitorial work in the running of the restaurant, defendant uses freely the labor of prisoners in the City jail. A. 440. Neither the City of Miami, nor the prisoners, realistically, are individually compensated for labor performed. A. 440. Defendant failed to mention this in their Statement of the Case.

Defendant solicits its membership from the Miami Police Academy on the City premises during working hours. A. 443, 456-457. During the same hours, black police trainees have been informed by officers of defendant corporation that membership was not available to them—that black trainees should seek membership in the black police organization. A. 518, 533, 457.

Defendant operates vending machines placed in police headquarters in the City of Miami Municipal Building. A. 467.

Defendant is represented at all staff meetings of the police department of the City of Miami and helps bargain for wages at City Commission meetings. A. 457.

Defendant uses the facilities of the police department such as the roll-call room, for official activities and business of defendant corporation. A. 420-421, 512-513.

Defendant uses the name Miami Police in its title and holds itself out to the public as City of Miami policemen. (Plaintiffs' Exhibit 1 and 3).

Defendant solicits contributions from the public using the name Miami Police; Defendant solicited over ninety thousand dollars ($90,000.00) from the public in its last fiscal year by holding itself out to be police officers of the City of Miami Police Department. A. 428.

All of defendant's activities are conducted openly with the consent and approval of the City of Miami.

Defendant maintains the following funds which its membership is entitled to participate in, and which benefits its membership:

a. A death benefit fund

b. A group insurance fund

c. A retirement fund

d. A sick and disability fund

e. An attorney's fund.

Defendant has accumulated over one hundred thirty-seven thousand dollars ($137,000.00) in mutual funds and cash to use for the benefit of its members. A. 444. Additionally, defendant has the power to borrow from the monies solicited from the public for private use by its membership. A. 437.

From monies accumulated over a period of years, defendant has come into ownership of substantial real estate. A. 431-432.

Contributions made to the defendant association, according to its financial secretary, are tax deductible as charitable. Further, defendant enjoys tax-exempt status under Federal Internal Revenue Service Regulations. A. 437.

As non-members of defendant corporation, black police officers are excluded from social affairs sponsored annually for members and their families. Such social events are held on the grounds and in the buildings owned by defendant corporation. A. 460-461.

Defendant, Miami Police Benevolent Association, over the years has pursued a pattern or practice of racial discrimination which has deprived plaintiffs of the same rights enjoyed by white persons. Until recent years, Plaintiffs were not only ineligible for membership in defendant corporation, but could not eat in the restaurant owned and operated by defendant in the City of Miami Municipal

Justice Building — another fact which Defendant deliberately omitted from its Statement of the Case. A. 497.

At trial plaintiffs called the officers of Defendant corporation as their main witnesses and it was testimony of those corporate officers which formed the facts as found by the trial court. The facts are uncontradicted.

The trial court concluded as a matter of law that defendant, Miami Police Benevolent Association, "has engaged in a pattern or practice and custom or usage of racial discrimination in violation of the rights guaranteed black persons by 42 U.S.C. 1981 through 1983. The Court of Appeals in affirming believed that the appellees "made their case under §1983 and did not reach §§1981 and 1982.

REASONS RELIED ON AS TO WHY THE WRIT SHOULD BE DENIED

A. THE SUPREME COURT WILL NOT GRANT CERTIORARI TO REVIEW EVIDENCE AND DISCUSS SPECIFIC FACTS.

Where the decision of the Court of Appeals sought to be reviewed turns entirely upon an appreciation of the particular facts involved or upon construction of particular contracts or written instruments, a petition for certiorari ordinarily is denied as lacking "substantial grounds". [Remarks of Mr. Chief Justice Hughes at the ALI Meeting (1934) 20 A.B.A.J., 341]. It is true that in rare instances cases turning merely upon an appreciation of particular facts will be distinguished by an importance which the Court believes warrants reexamination by the Supreme Court. *United States v. McGowan*, 290 U.S. 592.

A further exception exists where two Courts of Appeals have made divergent findings of fact in respect of the same matter, since preservation of uniformity of decisions in lower federal courts is, of itself, a matter of public concern. But the conflict must be real, and a writ granted because of an asserted conflict will suffer dismissal as improvidently granted if after argument, it appears "that the asserted conflict in decision arises from differences in states of fact, and not in the application of a principle of law". *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813; *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202. In addition to the foregoing general considerations, it is a familiar principle often applied in the Supreme Court that findings of fact concurred in by two lower courts will be accepted by the Supreme Court unless clear error is shown. *Faulkner v. Gibbs*, 338 U.S. 267, 268.

The District Court found the facts indisputably as follows:

A. The Parties

1. The plaintiffs are all classified black policemen who are now regularly employed by the City of Miami Police Department under Civil Service, and all black classified policemen who will be regularly employed by the City of Miami Police Department under Civil Service in the future.

2. The defendant, Miami Police Benevolent Association, is a non-profit corporation made up of members of the Miami Police Department, and has its offices located in Miami, Florida. Among its purposes are to promote the efficiency of the police department, to promote coopera-

tion and harmony of its members, and to promote harmony and cooperation with the general public and public officials.

3. The defendant maintains the following funds which its membership is entitled to participate in and which benefits its membership:

a. A death benefit fund.

b. A group insurance fund.

c. A retirement fund.

d. A sick and disability fund.

e. An attorneys' fund.

4. This Court has jurisdiction over the parties and the subject matter of this action.

B. The defendant acts under color of state law and is an adjunct of the City of Miami Police Department.

1. The defendant uses the name police in its title and holds itself out to the public by using the name police in its title.

2. The defendant solicits contributions from the public using the name police. In fact, in the last fiscal year, the defendant solicited over $90,000 from the public by holding itself out to be police officers of the City of Miami Police Department.

3. It operates a canteen at the City of Miami Police headquarters. In operating this canteen, the defendant employs four persons, and in addition, uses prison labor. The canteen operation nets the defendant over $2,000 per month.

4. The defendant operates vending machines and has the use of bulletin boards at the City of Miami Police Department.

5. The defendant is represented at staff meetings held at the City of Miami Police Department where policies of the police department are discussed and made.

6. The defendant is represented at City Commission meetings where it bargains for wages and other benefits for the City of Miami Police Department.

7. The defendant uses the facilities of the local police department, including its police academy to solicit prospective members. In fact, it has enrolled over 75% of its members through solicitation at the police academy.

8. The defendant uses the City of Miami Police Department for meetings and in fact, has used the police department building in casting ballots for its officers.

9. All of the above activities are conducted openly with the consent and approval of the City of Miami Police Department.

C. Discriminatory Acts of the Defendant.

1. The defendant has never had a black member. At the present time the defendant has over 400 members, all of whom are Caucasian.

2. Until March 23, 1970, the defendant had a clause in its Constitution "For Caucasians Only". This clause made it impossible for a black person to become a member. In 1959, Willie Calhoun, a black officer applied and was rejected because of this clause. David Madison and George Kemp, black officers of the Miami Police Department, were told at the police academy that the defendant was for Caucasians only and that they should seek their own organization, the Community Police Benevolent Association.

3. Up until March 23, 1970, only one white applicant was rejected for membership in the defendant.

4. The defendant has always had a provision that a prospective member must be over 21 years of age and under 32 years of age.

5. The defendant has a clause that a person must be under 32 years of age because it maintains a death benefit fund. This fund is maintained on an actuarial basis, and on the basis of the recommendations of the defendant's actuaries, the above limit has been set.

6. On March 23, 1970, the clause "For Caucasians Only", was deleted from the defendant's Constitution. On March 23, 1970, the defendant also changed the voting procedure with respect to a prospective applicant. Prior to

March 23, 1970, it was only necessary for a prospective member to receive a majority vote of the membership in order to be accepted. After March 23, 1970, five negative votes of the membership could veto a prospective applicant.

7. Since March 23, 1970, 28 white applicants have applied for membership with the defendant. Only four white applicants were rejected. Since March 23, 1970, seven black applicants have applied for membership with the defendant. All of the black applicants were rejected on December 22, 1970. The four white applicants were rejected on the same date as the black applicants.

8. The deletion of the clause "For Caucasians Only" has been substituted for by the inclusion that the negative votes of any five members of the defendant can exclude a prospective applicant. This change is negative and has effectively barred black policemen from membership in the defendant.

9. The defendant, Police Benevolent Association, over the years has pursued and continues to pursue a pattern or practice of racial discrimination which has deprived and continues to deprive the plaintiffs of the same right to make and enforce contracts, the same right to enjoy property, and the same right to enjoy equal protection of the laws as is enjoyed by white persons.

10. The plaintiffs, over the years, have accepted all Caucasian applicants who were under the age of 32, who were regularly employed classified police officers for the City of Miami Police Department under Civil Service, who were in good standing with the police department, and who paid their $5.00 application fee.

11. By its own constitution and By-Laws, the only requirements for membership are that the applicant be a "classified police officer who is now regularly employed on the payroll of Miami Police Department under civil service or who may hereinafter become a member under civil service with the exception of the Director of Public Safety and the Police Chief . . . "

That the Petitioner is not a private club is well-founded in fact.

THE STATE IS SIGNIFICANTLY INVOLVED IN THE INVIDIOUS DISCRIMINATION.

It is held that where the impetus for the discrimination is private, the State must have "significantly involved itself with the invidious discrimination." *Reitman v. Mulkey*, 387 U.S. 369. In this case the court, without labor, found Petitioner to be not private, but entwined with the City of Miami Police Department. Even if it be assumed for argument that Petitioner is a private club, by the law of the cases the State would still be found significantly involved.

Petitioner argues that as a private club, there is no discrimination under color of law unless there is evidence that the State of Florida or City of Miami has *compelled* the act, relying on *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 169. The record will show that as recently as 1962, black policemen were assigned to a black precinct in a black neighborhood, were not permitted to attend the training academy at the Municipal Building along with

white policemen, were not allowed to sit and eat in the canteen operated by Petitioner in the City of Miami Building, were not represented in policy-making and bargaining sessions at staff and commission meetings, and that the exclusion from membership in the Police Benevolent Association is but a remaining vestige of many discriminatory laws, customs, and practices of the City of Miami.

First in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, and in *Reitman*, supra, this Court held that it has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestation" has become significantly involved in private discrimination. Only by sifting facts and weighing circumstances on a case-by-case basis can a nonobvious involvement of the State in private conduct be attributed its true significance.

In *Burton*, the Court found that the state had elected to place its power, property and prestige behind the admitted discrimination by inaction. After sifting all the facts and weighing circumstances the lower court decided that there was significant state action and the Court of Appeals did not believe that determination to be clearly erroneous.

Thus, it would have made no difference in the results if Petitioner had been found to be a private club. The facts support a finding of significant state involvement to make the discrimination in this case under color of law.

THE DECISION BELOW DOES NOT CONFLICT WITH THE SUPREME COURT OR OTHER COURTS OF APPEALS WITH RESPECT TO INTERPRETATION OF 42 U.S.C. §1983.

As a last desperate argument, Petitioner argues that the decision below was clearly erroneous with respect to application of the law but does not set forth any cases with similar states of fact. In *Adickes*, supra, the Court ruled that

> "the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections."

Unlike the *Adickes* case, the person charged with discrimination here is not a private party, in this case the lower court found a clear case of state involvement, and in the instant case the discrimination was not in personal affairs.

The cases cited by Petitioner in support of its argument that the decision below is in conflict with the decisions in other Courts of Appeals have no factual similarities to this case nor to each other. Petitioner does not even attempt to show factual similarities. *Cole v. Smith*, 344 F.2d 721, involved an assault on a prisoner by hospital aides. *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440, was brought against an acting sheriff and deputy, who, along with the president of the club where the sheriff and deputy worked after leaving official duty, ejected plaintiff from the premises because of his race. *Williams v. Yellow Cab*

Company of Pittsburgh, 200 F.2d 302, may stand for the proposition that the mere fact that a union is licensed by the state does not mean that its discriminatory representation of members on basis of race constitutes significant state action. In *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, the Court of Appeals for the 2nd Circuit in holding that the Society did not act under color of State law, considered all aspects of the organization to include its history, relationship to the public, persons it serves and its expressed purposes. Examined in the same light, it is readily apparent that Petitioner is, and always has been closely entwined with the City of Miami Police Department. State action does not require governmental control, regulation or interference. As in *Burton*, state action may take the form of inaction.

None of the cases cited by Petitioner evidences any real conflict in application of the law. The asserted conflicts arise not from the application of a principle of law, but from differences in states of fact.

RESPONDENTS HAVE BEEN DEPRIVED OF CONSTITUTIONALLY PROTECTED RIGHTS UNDER 42 U.S.C. 1981 THROUGH 1983.

It is clear that by excluding black police officers on account of race, Petitioner has denied Respondents, among other things, the following contract and property rights:

1. The right to be a member of a non-private organization even though Respondents meet all requirements.

2. The right to bargain for wages and fashion operational policies of the Miami Police Department.

3. The right to contract for death benefits, sick and disability benefits and low-cost legal assistance.

4. The right to use the P.B.A. facilities, attend membership meetings, and participate in P.B.A. social functions.

A pattern or practice which denies to black persons the same right to property and to make contracts as enjoyed by white persons violates 42 U.S.C. 1981 and 1982.

Denying to Plaintiffs enjoyment of the above rights and opportunities for the reason that they are black constitutes a badge or incident of slavery and is therefore prohibited. *Jones v. Mayer*, 392 U.S. 409; *Sullivan v. Little Hunting Park*, 396 U.S. 235; *Sanders v. Dobbs House*, 431 F.2d 604; *Mizell v. North Broward Hospital District*, 427 F.2d 468; *Harkless v. Sweeney Independent School District*, 427 F.2d 319.

In *Sullivan v. Little Hunting Park*, supra, the action of a community association in refusing to approve transfer of a white shareholder's membership share to a Negro incident to real property lease, which share would have given him the right to use the association's recreational facilities, violated 42 U.S.C. 1982.

CONCLUSION

The findings of fact of the lower courts are not clearly erroneous. The decision of the lower courts does not conflict with decisions of the Supreme Court and other Courts of Appeal with respect to application of 42 U.S.C. 1981 through 1983. Based on the complaint and answer filed in the trial court, there was not a right to trial by jury and besides, that issue was abandoned by Petitioners in the Court of Appeals.

The Petition for Writ of Certiorari states no substantial grounds for granting the writ therefore the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of July, 1972, three copies of the Response to Petition for Writ of Certiorari were mailed, postage prepaid, to K. NEIL GLASSFORD, Attorney for Petitioner, 802 Greater Miami Federal Building, 200 Southeast First Street, Miami, Florida 33131. I further certify that all parties required to be served have been served.

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